A **TAU KAU TIAH**

v.

TETUAN TEH KIM TEH, SALINA & CO

B HIGH COURT MALAYA, SHAH ALAM
VERNON ONG J
[ORIGINATING MOTION NO: 25-5-2008]
7 JANUARY 2014

C ***LEGAL PROFESSION:*** *Professional discipline - Misconduct - Breach of undertaking - Appeal against Disciplinary Board's decision in dismissing complaint against legal firm - Legal firm held land as stakeholder - Whether in breach of undertaking in refusing to return land titles - Whether legal firm acted in manner unbefitting of advocate and*
D *solicitor - Whether legal firm entitled to make interpleader application - Whether evidence showed collusion between developer and legal firm - Whether appeal allowed and decision of Disciplinary Board set aside*

CIVIL PROCEDURE: *Judgments - Grounds of - Whether entire*
E *decision of Court of Appeal set aside by decision of Federal Court - Legal firm held land as stakeholder and refused to return titles - Whether there was breach of undertaking - Whether legal firm entitled to make interpleader application - Whether Federal Court set aside Court of Appeal's finding that there was collusion between legal firm and developer in withholding titles*
F

The appellant and Bintang Merdu Sdn Bhd ('the developer') entered into a joint venture agreement ('the JVA') for the subdivision and development of a piece of land. Pursuant to the JVA, the appellant deposited the original title deed to the land
G with the respondent legal firm ('the respondent'). The land was subsequently sub-divided into several lots; the remaining 18 sub-divided titles were registered in the name of the appellant and held by the respondent as stakeholder. Arising from a dispute between the appellant and the developer, the parties referred the
H dispute to arbitration. Meanwhile, the appellant wrote to the respondent asking for the 18 sub-divided titles to be returned to the appellant. The respondent however stated that they could not release the titles until the receipt of a valid and binding order of the arbitrator or the High Court. On 18 January 2006 and
I 16 April 2007 respectively, the appellant lodged his first and second complaint to the Disciplinary Board ('the DB') against the respondent over the respondents refusal to return the

18 sub-divided titles to the appellant, which were dismissed by the DB. On 13 April 2007, the developer filed proceedings in the High Court to, *inter alia*, remove the arbitrator and to restrain the appellant from proceeding with the then on-going arbitration proceedings ('the removal action'). On 4 May 2007, the arbitrator made an award ('the arbitral award') in favour of the appellant, ordering the immediate return to the appellant all of the 18 sub-divided titles without any conditions whatsoever. In the High Court proceedings, the developer filed to set aside the arbitral award ('setting aside action') while the appellant filed proceedings for leave to enforce the arbitral award ('enforcement action'). The respondent refused to comply with the appellant's demand for the return of the 18 titles on the grounds that the arbitral award had not been registered as a judgment of the High Court and was therefore not final and binding. On 16 May 2007, the appellant lodged a third complaint with the DB in respect of the respondent's refusal to hand over the 18 titles. The DB dismissed the third complaint on the grounds that the complaints were premature as there were still on-going proceedings and therefore, the Board was not able to come to a firm conclusion that there was as yet a valid and binding order of the arbitrator. On 6 March 2008, the High Court ordered that the 18 titles remain with the respondent as stakeholder until the other proceedings in the High Court were determined ('the interpleader order'). On 14 July 2009, the respondent's actions in the removal action and the setting aside action were both dismissed by the High Court. Leave was granted to the appellant to enforce the arbitral award in the enforcement action. On 11 August 2009, the respondent returned the 18 titles to the appellant. The Court of Appeal on 5 March 2010 allowed the appellant's appeal against the interpleader order and ordered the respondent to return the 18 titles to the appellant. On 15 November 2010, the Federal Court granted leave for the respondent to appeal against the order of the Court of Appeal on the question as to whether damages could be awarded pursuant to a counterclaim by way of affidavit used in an interpleader originating summons proceedings. On 29 May 2013, the Federal Court allowed the respondent's appeal and the award of damages to the appellant by the Court of Appeal was set aside. The appellant herein appealed against the decision of the DB dismissing the appellant's complaint against the respondents. The principal issue to be determined was whether the entire decision of the Court of Appeal had been set aside by

A the Federal Court decision and if not, whether the Federal Court had set aside the Court of Appeal's finding that there was collusion between the respondent and the developer in withholding the 18 titles.

B **Held (allowing appeal; setting aside decision of DB):**

(1) When the sealed order and the grounds of the judgment of the Court of Appeal were read together, it was clear that there were two main components to the judgment. Firstly, the Court of Appeal had set aside the interpleader order and
C that the respondent was required to return the 18 titles to the appellant. Secondly, the Court of Appeal had awarded damages on the appellant's counterclaim against the respondent. (para 50)

D **(2)** From a careful perusal of the sealed order and the grounds of judgment of the Federal Court, it could be discerned that (i) the Federal Court had affirmed the Court of Appeal's decision on the interpleader order but had set aside the specific order for the return of the 18 titles because the titles
E had already been returned earlier; and (ii) the Federal Court overturned the Court of Appeal's decision allowing the counterclaim and the award of damages together with interest. (para 61)

F **(3)** In light of the foregoing, two conclusions could be inferred. Firstly, the respondent was not entitled to make the interpleader application. Secondly, the respondent was in breach of its undertaking when it refused to return the 18 titles to the appellant after being served with the arbitral
G award. (para 62)

(4) Both the Court of Appeal and the Federal Court agreed that the evidence showed collusion between the developer and the respondent. This court was therefore constrained to allow the
H appeal and set aside the decision of the DB. However, this court was mindful of the well-settled principles on the legal profession being a self-regulating profession so that such matters should be decided upon by their peers. Accordingly, the court further ordered that the DB appoint a Disciplinary
I Committee to conduct a formal investigation into the appellant's complaint. (paras 69 & 70)

Case(s) referred to:

Au Kong Weng v. Bar Committee, Pahang [1980] 1 LNS 4 CA ***(refd)***

Dr Siti Aishah Abdullah v. Majlis Perubatan Malaysia [2010] 1 LNS 1788 HC ***(refd)***

Gana Muthusamy v. Tetuan LM Ong & Co [1998] 4 CLJ 878 CA ***(refd)***

Kerajaan Malaysia & Ors v. Tay Chai Huat [2012] 3 CLJ 577 FC ***(refd)***

Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v. Uta Badi K Perumal [2001] 2 CLJ 525 FC ***(refd)***

Loh Chow Tet v. Kok Bun Kau [2012] 1 LNS 386 CA ***(refd)***

Marzaini Zainuddin v. Majlis Peguam Negara [2007] 10 CLJ 339 HC ***(refd)***

Mobikom Sdn Bhd v Inmiss Communications Sdn Bhd [2007] 3 CLJ 295 CA ***(dist)***

Samat Din & Partners v. Bank Pembangunan Malaysia Bhd & Anor [1997] 4 CLJ 153 CA ***(refd)***

Trikkon Sdn Bhd v. Dato' Mahinder Singh Dulku [2008] 1 LNS 786 HC ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 17

For the appellant - Annou Xavier; M/s Azri, Lee Swee Seng & Co

For the respondent - KL Pang (Shelby Chin with him); M/s Cheah Teh & Su

Reported by Suhainah Wahiduddin

JUDGMENT

Vernon Ong J:

[1] On 16 October 2013, the court allowed the appellant's appeal against the decision of the disciplinary board made on 8 December 2007 dismissing the appellant's complaint against the respondent legal firm. The following orders were made by the court:

(i) That the decision of the disciplinary board dated 8 December 2007 in Complaint No. DB/07/2968 in dismissing the complaint against the respondent, Messrs Teh Kim Teh, Salina & Co be set aside;

(ii) That the disciplinary board do proceed to appoint a disciplinary committee to carry out a formal investigation into the appellant's said complaint in accordance with the relevant provisions of the Legal Profession Act, 1976; and

A (iii) Costs of the appeal of RM10,000 be paid by the respondent to the appellant within 14 days of the date of the order.

Brief Account Of The Salient Facts

B **[2]** The appellant was the registered owner of a piece of land held under EMR No. 8466 Lot No. 2485, Mukim of Kapar, District of Klang ("the Land") measuring approximately 3 a. 2 r. 21 p.

[3] On 22 March 1995, the appellant and Bintang Merdu Sdn C Bhd ("the developer") entered into a joint venture agreement ("the JVA") for the subdivision and development of the Land into a light industrial building estate.

[4] Pursuant to the JVA, the appellant deposited the original title D deed to the land with the respondent.

[5] The land was subsequently sub-divided into 19 lots, one of which was surrendered to the authorities; the remaining 18 sub-divided titles were registered in the name of the appellant. The 18 sub-divided titles were held by the respondent as E stakeholder.

[6] Pursuant to a supplemental agreement dated 23 April 1998, the completion period for the construction of the industrial lots by the developer was extended to 22 March 2003.

F

[7] Arising from a dispute between the appellant and the developer, the parties referred the dispute for arbitration.

[8] Meanwhile, the appellant had written to the respondent G asking for the 18 sub-divided titles to be returned to the appellant. In their reply dated 30 March 2007, the respondent stated *inter alia* that they cannot release the titles until receipt of a valid and binding order of the arbitrator or the High Court.

[9] Altogether, the appellant lodged three complaints with the H disciplinary board. The impugned decision of the disciplinary board relates to the third complaint.

I

First Complaint

[10] On 18 January 2006, the appellant lodged his first complaint to the disciplinary board ("the DB") against the respondent over the respondent's refusal to return the 18 sub-divided titles to the appellant even though notice to arbitrate has been issued by the appellant.

[11] The DB dismissed the first complaint on 6 May 2006. There are no pending proceedings in respect of the first complaint. It is not the subject matter of this appeal.

[12] On 13 April 2007, the developer filed proceedings under Originating Motion No. R2-25-76-07 to, *inter alia* remove the arbitrator and to restrain the appellant from proceeding with the then on-going arbitration proceedings ("the removal action").

Second Complaint

[13] On 16 April 2007, the appellant lodged his second complaint to the DB against the respondent over the respondent's refusal to return the 18 sub-divided titles to the appellant even though the developer had refused to participate in the arbitration proceedings.

[14] The DB dismissed the second complaint on 8 December 2007. There are no pending proceedings in respect of the second complaint; the second complaint is also not the subject matter of the present appeal.

Arbitral Award

[15] On 4 May 2007, the arbitrator made an award ("the Arbitral Award") in favour of the appellant. The arbitrator *inter alia* ordered the immediate return by the developer to the appellant of all the 18 sub-divided titles without any conditions whatsoever.

High Court Proceedings

[16] The developer filed proceedings *vide* Originating Motion No. D6 [R4 (R2)]-25-133-07 to *inter alia* set aside the Arbitral Award ("setting aside action").

[17] Meanwhile, the appellant filed proceedings *vide* Originating Summons No. D6 [R4 (R2 (R1))] -24-51-07 for leave to enforce the Arbitral Award ("enforcement action").

[18] On 7 May 2007, the appellant's solicitors wrote to the respondent demanding for the return of the 18 titles relying on the Arbitral Award. The respondent refused to comply with the appellant's demand.

[19] The respondent's refusal is premised on the grounds that the Arbitral Award has not been registered as a judgment of the High Court and is therefore not final and binding.

Third Complaint

[20] On 16 May 2007, the appellant lodged a third complaint with the DB in respect of the respondent's refusal to hand over the 18 titles to the appellant despite the Arbitral Award ordering the same.

[21] The DB dismissed the third complaint on the following grounds:

> ... the Board was of the view that the complaints which were based on the letter dated 30.3.2007 were premature as there were still ongoing proceedings and therefore the Board was not able to come to a firm conclusion that there was as yet 'a valid and binding' Order of the Arbitrator. The Board noted that the Order of Arbitrator dated 4.5.07 was under challenge in the High Court.

[22] The third complaint is the only live complaint and is the subject matter of the present appeal.

Interpleader Proceedings

[23] On 25 June 2007, the respondent filed interpleader proceedings in the High Court relating to the 18 titles.

[24] On 6 March 2008, the High Court ordered that the 18 titles remain with the respondent as stakeholder until the other proceedings in the High Court are determined ("the interpleader order").

Removal Action And Setting Aside Action Dismissed

[25] On 14 July 2009, the respondent's actions in the removal action and the setting aside action were both dismissed by the High Court.

Enforcement Action Allowed

[26] Leave was granted to the appellant to enforce the Arbitral Award in the enforcement action.

Return Of 18 Titles

[27] On 11 August 2009, the respondent returned the 18 titles to the appellant.

Court Of Appeal Sets Aside Interpleader Order

[28] The Court of Appeal on 5 March 2010 allowed the appellant's appeal against the Interpleader Order. It ordered the respondent to forthwith, and in any event no later than 19 days after being served with the order, to return the 18 titles to the appellant.

Respondent's Application To Federal Court For Leave

[29] Dissatisfied with the decision of the Court of Appeal, the Respondent applied to the Federal Court on a number of questions concerning the issue of breach of undertaking as stakeholder.

[30] On 15 November 2010, the Federal Court granted leave for the respondent to appeal against the order of the Court of Appeal on the following question:

> Can damages be awarded pursuant to a Counterclaim by way of Affidavit used in an Interpleader Originating Summons proceedings brought under Order 17 of the Rules of the High Court 1980?

[31] On 29 May 2013, the Federal Court answered the question in the negative. Consequently, the respondent's appeal was allowed and the award of damages to the appellant by the Court of Appeal was set aside ("the Federal Court Decision").

Appellant's Submission

[32] Learned counsel for the appellant submitted that the respondent committed a breach of undertaking when they refused to return the 18 titles to the appellant despite being served the Arbitral Award.

[33] The respondent's undertaking are contained in the following letters from the respondent to the appellant:

Respondent's letter dated 4 July 2005

> Since your client and our client are unable to settle their dispute amicably, we, as stakeholders of the title deeds, can only act according to the final decisions or instructions of the proper forum. …
>
> … Any matter relating to the above issue shall be dealt with by the proper forum and handled professionally by the solicitors for the parties and we will act upon the final decisions or instructions of the proper forum.

Respondent's letter dated 30 March 2007

> … we cannot release those titles which are in our custody to any party until our receipt of a valid and binding order from either the Arbitrator or the High Court, as the case may be, in that respect

Respondent's letter dated 6 April 2007

> Our position is that all issues relating to the above matters must be left to be decided by the Arbitrator and/or the Court, as the case may be.

[34] A breach of an undertaking by solicitors amounts to misconduct (*Loh Chow Tet v. Kok Bun Kau* [2012] 1 LNS 386; [2012] MLJU 191 CA).

[35] The issue of whether the respondent was in breach of its undertaking to release the 18 titles after being served with the Arbitral Award has already been decided with finality by the Court of Appeal, when deciding the appeal on the interpleader proceedings.

[36] The respondent's main 'defence' to the third complaint that the Arbitral Award has not been registered as a judgment of the High Court had also been canvassed before the Court of Appeal and had been dismissed.

[37] Further, the grounds given by the DB in dismissing the third complaint have also been canvassed before the Court of Appeal and have been dismissed.

[38] As such, it was submitted that the decision of the Court of Appeal on the issue of breach of undertaking is final and binding on the parties. The Federal Court decision concerns only the question of damages and not liability.

Respondent's Submission

[39] Learned counsel for the respondent submitted that all the third complaints by the appellant against the respondent have been dismissed by the DB. The courts rarely interfere with the decisions of the DB when entertaining an appeal from the DB (*Marzaini Zainuddin v. Majlis Peguam Negara* [2007] 10 CLJ 339; [2007] 8 MLJ 697; *Au Kong Weng v. Bar Committee, Pahang* [1980] 1 LNS 4; [1980] 2 MLJ 89; *Gana Muthusamy v. Tetuan LM Ong & Co* [1998] 4 CLJ 878; [1998] 3 MLJ 341 CA; *Loh Chow Tet v. Kok Bun Kau* [2012] 1 LNS 386; *Dr Siti Aishah Abdullah v. Majlis Perubatan Malaysia* [2010] 1 LNS 1788; *Trikkon Sdn Bhd v. Dato' Mahinder Singh Dulku* [2008] 1 LNS 786; [2009] 3 MLJ 98).

[40] The respondent had given satisfactory explanation to the DB in that whilst the appellant is demanding for the return of the 18 titles based on the Arbitral Award, the developer had warned the respondent, as stakeholders' solicitor, not to release the same. In the meantime, the developer had filed the removal action to remove the arbitrator whilst the appellant had filed the enforcement action to register the Arbitral Award.

[41] Being confronted with the two applications filed by the appellant and the developer, to which the respondent was not made a party thereto, the respondent had no choice but to file an interpleader summons under O. 17 Rules of the High Court 1980. The High Court had allowed the interpleader summons application on 6 March 2008 and *inter alia* ordered that the respondent be retained as stakeholder solicitors for the 18 titles until disposal of the pending actions at the Kuala Lumpur High Court.

[42] It was on 6 March 2008 where the respondent obtained the Interpleader Order to hold the 18 titles as stakeholder's solicitor pending the outcome of the other actions in the Kuala Lumpur High Court.

[43] Therefore, learned counsel for the respondent submitted that the respondent had never acted in a manner unbefitting of an advocate and solicitor under the Legal Profession Act 1976 or

acted in a misconduct fashion (*Mobikom Sdn Bhd v. Inmiss Communications Sdn Bhd* [2007] 3 CLJ 295; [2007] 3 AMR 195). As there were numerous claims being made of the respondent in respect of the 18 titles, the respondent was duty bound to apply to court by way of interpleader proceedings to seek directions as to what he should do (*Samat Din & Partners v. Bank Pembangunan Malaysia Bhd & Anor* [1997] 4 CLJ 153; [1997] 3 MLJ 542).

[44] Learned counsel for the respondent also submitted that the Federal Court in the Federal Court decision had set aside the entire decision and part of the Court of Appeal (*Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v. Utra Badi K Perumal* [2001] 2 CLJ 525 FC; *Kerajaan Malaysia & Ors v. Tay Chai Huat* [2012] 3 CLJ 577 FC).

Decision

[45] In this appeal, the principal issue to be determined relates to the following question:

Whether the entire decision of the Court of Appeal had been set aside by the Federal Court Decision. If not, whether the Federal Court set aside the Court of Appeal's finding that there was collusion between the respondent and the developer in withholding the 18 titles.

High Court's Decision - The Interpleader Order

[46] The salient parts of the Interpleader Order dated 6 March 2008 made by the High Court ordering the 18 titles to remain with the respondent as stakeholders read as follows:

> ... ADALAH DIPERINTAHKAN bahawa Plaintiff [Respondent herein] kekal sebagai pemegang amanah bagi lapan belas (18) suratan hakmilik ... sehingga kes-kes Mahkamah Tinggi Kuala Lumpur R2-25-76-2007 dan R1-24-51-2007 diputuskan ... (parenthesis added)

Court Of Appeal's Decision Setting Aside Interpleader Order

[47] The sealed order of the Court of Appeal dated 5 March 2010 deals with a number of matters as will be clear from a perusal of the salient parts of the order below:

> (1) rayuan pihak Perayu [Appellant herein] adalah dibenarkan dengan kos RM20,000.00;

(2) keputusan Pesuruhjaya Kehakiman Mahkamah Tinggi bertarikh 6.3.2008 adalah diketepikan; A

(3) Mahkamah memerintahkan Responden Pertama [Respondent herein] dengan serta-merta agar tidak lewat dari 10 hari dari tarikh penyerahan Perintah Mahkamah ini untuk memulangkan 18 dokumen asal hakmilik tanah yang berikut kepada pihak Perayu [Appellant herein] … B

(4) Gantirugi am untuk kehilangan penggunaan hartanah tersebut, gantirugi tambahan teruk ("aggravated damages") untuk penahanan secara salah hartanah tersebut dan gantirugi teladan ("exemplary damages") ditaksirkan oleh Penolong Kanan Pendaftar Mahkamah Tinggi di Kuala Lumpur dan setalah ditaksirkan dibayar oleh pihak Responden Pertama [Respondent herein] kepada pihak Perayu [Appellant herein], dan kos taksiran tersebut hendaklah ditanggung oleh Responden Pertama [Respondent herein]; C D

(5) kesemua gantirugi dikenakan faedah pada kadar 8% setahun dari 4.5.2007 sehingga satu hari sebelum Perintah ini dibuat. Selepas itu, semua gantirugi termasuk faedah sebelum Perintah ini dikenakan faedah pada kadar 8% setahun dari tarikh Perintah ini sehingga realisasi sepenuhnya; … (emphasis added) E

[48] At this point, it must be emphasised that the aforesaid order of the Court of Appeal should have been read in conjunction with the Court of Appeal's grounds of judgment. A scrutiny of the grounds of judgment will indicate that: F

- Paragraphs [2] to [20] deals with the facts of the case;
- Paragraphs [21] to [94] deals with the respondent's interpleader application; and G
- Paragraphs [95] to [100] deals with the appellant's counterclaim for damages.

[49] In order to appreciate the significance of the Court of Appeal's decision, it will also be necessary to examine the following passages of the grounds of the judgment of the Court of Appeal: H

(Court of Appeal's finding on the issue of whether the respondent was in breach of its undertaking to return the 18 titles after being served with the Arbitral Award) I

A [41] Since the outcome of the arbitration has been determined, the first respondent [Respondent herein] must strictly comply with their undertaking. It is our judgment that the first respondent [Respondent herein] as trustees of the 18 original issue documents of title are not competent to take out a stakeholder's interpleader summons.

B

[42] Pure and simple, the case of the appellant [Appellant herein] pertains to an enforcement of the breach of an undertaking given by the first respondent [Respondent herein].

C (Court of Appeal's finding on respondent's defence that the Arbitral Award had not been registered as a judgment)

[32] It was argued on behalf of the first respondent [Respondent herein] that the arbitration award must first be registered in the High Court before it can be enforced against any party. It must
D be recalled that the first respondent [Respondent herein] refused to be a party to the arbitration. That being the case, the issue of enforcing the arbitration award against the first respondent [Respondent herein] did not arise. The appellant [Appellant herein] had sought to enforce not the arbitration award but rather the undertaking given by the first respondent [Respondent herein].

E

....

[61] It was argued by the first respondent [Respondent herein] that their letter dated 30 March 2007 alluded to a condition that there was a need to have the arbitration award to be registered
F first before it can be binding on them. We have reproduced the salient parts of the letter date 30 March 2007 in the early part of this judgment ... and we found that there was no such condition stipulated in the said letter at all.

G [62] It was argued on behalf of the first respondent [Respondent herein] that the appellant [Appellant herein] was seeking to register the arbitral award under s 27 of the Arbitration Act 1952 (Act 93). However, s 27 of the Arbitration Act 1952 (Act 93) talks of an enforcement of an award and not in regard to registering an arbitral award. ...

H

[Court of Appeal's finding on grounds given by DB for dismissing the third complaint]

[57] ... the award under our Arbitration Act 1952 (Act 93) is
I expressly stated to be final and binding irrespective of whether there is any pending appeal to have it set aside.

[58] But that does not mean that the second respondent (Developer herein] cannot apply to have the arbitral award set aside or for that matter resist the application of the appellant [Appellant herein] to enforce the arbitral award. And even if the arbitral award is for some reason or other is set aside at a later stage, the first respondent [Respondent herein] shall and must adhere to its own undertaking once the arbitral award was handed down on 4 May 2007. The reason for this approach is quite simple. The future event which the undertaking is premised upon has come to pass. It is our judgment that the first respondent [Respondent herein] must honour its express undertaking which crystallises into a strict duty to release 18 original titles to the appellant [Appellant herein] upon the arbitral award being handed down in favour of the appellant [Appellant herein] by the arbitrator.

…

[66] Now, with the handing down of the arbitration award, it matters not that there are pending proceedings by the second respondent [Developer herein] to remove the arbitrator for misconduct and to restrain the arbitrator from acting further as well as for an injunction and to have the arbitral award set aside. With the handing down of the arbitration award it matters not that there is a pending proceeding by the appellant [Appellant herein] for leave to enforce the arbitral award against the second respondent [Developer herein].

[67] The first respondent [Respondent herein] has the audacity to argue that this appeal is premature and that the appellant [Appellant herein] must await the outcome of the other proceedings in the High Court bearing in mind that the first respondent [Respondent herein] was not even a party to the arbitration and the arbitral award. Yet the first respondent [Respondent herein] expressly accepted that they hold the 18 original titles on trust. As trustees, the first respondent [Respondent herein] are certainly in breach of trust when they failed to release the 18 original titles after the arbitrator has handed down his award ….

…

[72] It is our judgment that the subject matter for which the first respondent [Respondent herein] seeks interpleader relief - and that would be the original 18 issue documents of titles, have been ordered to be returned immediately to the appellant [Appellant]. We say categorically that there is nothing temporary or interim about this part of the arbitral award.

A …

[74] The order for the immediate return of the 18 original issue documents of title is final.

…

B

[80] The sum total of it all is this. That the arbitrator has given a final decision. It is for the immediate return of the 18 original issue documents of titles to the appellant [Appellant herein].

(Parenthesis added)

C

[50] When the sealed order and the grounds of the judgment of the Court of Appeal are read together, it will be clear that there are two main components to the judgment. Firstly, the Court of Appeal had set aside the Interpleader Order and that the D respondent is required to return the 18 titles to the appellant. Secondly, it is also clear that the Court of Appeal had awarded damages on the appellant's counterclaim against the respondent.

Federal Court Decision

E **[51]** At this juncture it is pertinent to note that the leave was granted to the respondent to appeal to the Federal Court on the sole question of law - whether damages can be awarded pursuant to a counterclaim by way of affidavit used in an interpleader originating summons proceedings brought under O. 17 of the F Rules of the High Court 1980 (see para. 29 above).

[52] As with the order of the Court of Appeal, it is also pertinent to refer to the sealed order of the Federal Court which reads as follows:

G

1. Rayuan pihak Perayu [Respondent herein] dibenarkan dengan kos sebanyak RM50,000.00;

2. Perintah Mahkamah Rayuan Malaysia bertarikh 5 haribulan Mac, 2010 di mana adalah diperintahkan bahawa:

H

Mahkamah memerintahkan Responden Pertama (Tetuan Teh Kim Teh, Salina & Co) dengan serta-merta agar tidak lewat dari 10 hari dari tarikh penyerahan Perintah Mahkamah ini untuk memulangkan 18 dokumen asal hakmilik tanah yang berikut kepada pihak Perayu (Tan Kau Tiah @ Tan Ching I Hai): …

(i) Gantirugi am untuk kehilangan penggunaan hartanah tersebut, gantirugi tambahan teruk ("aggravated damages") untuk penahanan secara salah hartanah tersebut dan gantirugi teladan ("exemplary damages") ditaksirkan oleh Penolong Kanan Pendaftar Mahkamah Tinggi di Kuala Lumpur dan setalah ditaksirkan dibayar oleh pihak Responden Pertama (Tetuan Teh Kim Teh, Salina & Co) kepada pihak Perayu (Tan Kau Tiah @ Tan Ching Hai), dan kos taksiran tersebut hendaklah ditanggung oleh Responden Pertama (Tetuan Teh Kim Teh, Salina & Co);

(ii) kesemua gantirugi dikenakan faedah pada kadar 8% setahun dari 4.5.2007 sehingga satu hari sebelum Perintah ini dibuat. Selepas itu, semua gantirugi termasuk faedah sebelum Perintah ini dikenakan faedah pada kadar 8% setahun dari tarikh Perintah ini sehingga realisasi sepenuhnya;

adalah diketepikan;

[53] In this connection, a perusal of the grounds of the judgment of the Federal Court will determine whether the entire decision of the Court of Appeal had been set aside by the Federal Court Decision. And if not, whether the Federal Court set aside the Court of Appeal's finding that there was collusion between the respondent and the developer in withholding the 18 titles.

[54] Paragraphs [1] to [16] of the Federal Court's grounds of judgments deal with the facts of the case.

[55] Paragraph [16] categorically states that leave to appeal was granted on one question of law, *viz*., whether damages can be awarded on a counterclaim by way of affidavit used in an interpleader proceedings.

[56] Following from para. [16], para. [17] sets out the parameters of the appeal. It states that the appeal related to the counterclaim only and not the interpleader or return of the 18 titles. Paragraph [17] reads as follows:

> [17] **In this appeal, the complaint of the Plaintiff is not against the decision of the Court of Appeal ordering the return of the 18 documents of titles to the second Defendant**. The Plaintiff had returned the documents of titles to the second Defendant on 11.8.2009. **As is clear from the Memorandum of**

> **Appeal, the complaint of the Plaintiff is against the decision of the Court of Appeal in allowing the counterclaim** (which was not set down for hearing) made by the second Defendant in his affidavit filed in opposing the Plaintiff's application for interpleader summons, and in ordering general damages, aggravated damages and exemplary damages … (emphasis added)

[57] It is also pertinent to note that the Federal Court did in fact hold that the Court of Appeal was correct in finding that there was collusion between the developer and the respondent in withholding the 18 titles. This can be discerned in paras. [43] and [44] which read as follows:

> [43] … **the Court of Appeal also found that the evidence showed collusion** …
>
> [44] Stakeholders should be impartial and should not "play on the same side" as one of the claimants … **In our view, on the evidence, the aforesaid finding of the Court of Appeal can be supported**. Having found so, the Court of Appeal concluded that the Plaintiff's application for interpleader relief should have been dismissed with costs … (emphasis added)

[58] It is also clear from a careful reading of the grounds of judgment of the Federal Court that the Federal Court had in fact affirmed the decision of the Court of Appeal in holding that the interpleader application ought to have been dismissed and that the Interpleader Order (the High Court's decision) be set aside. This can be found in para. [52]:

> [52] In our judgment, having found (rightly in our view) that the requirements under O. 17 r. 1(a) and O. 17 r. 3(3)(b) of RHC had not been satisfied, and having held that the application for interpleader relief should have been dismissed by the High Court, the Court of Appeal should have just set aside the decision of the High Court. …

[59] The fact that the appeal to the Federal Court was only in respect of the counterclaim is further confirmed in para. [44] read in conjunction with para. [52] which is as follows:

> [44] … Consequently, the Court of Appeal should only have set aside the decision of the High Court. Instead, it proceeded to consider the second Defendant's counterclaim. In doing so, the Court of Appeal misdirected itself. …

> [52] … The Court of Appeal could not then proceed to consider the counterclaim of the second Defendant, allowed it and ordered damages (which was to be assessed) to be paid by the Plaintiff to the second Defendant. The Court of Appeal had no jurisdiction to do so.

[60] Lastly, it is also pertinent to note the Federal Court's reasons for setting aside the order of the Court of Appeal for the return of the 18 titles in para. [58]:

> [58] The order of the Court of Appeal that the 18 original issue documents of titles were to be returned forthwith and not later than 10 days from the date of the Court of Appeal order, is set aside. This is consequential to our decision in allowing the appeal and setting aside the decision of the Court of Appeal in respect of damages. Additionally, as stated earlier in this judgment, following the High Court decisions dated 6.3.2008 and 14.7.2009, the Plaintiff had, on 11.8.2009 returned the 18 documents of title to the second Defendant. …. Be that as it may, *the fact is that by the time the decision was made by the Court of Appeal on 5.3.2010, the 18 documents of title had already been returned to the second Defendant, rendering academic the order of the Court of Appeal directing the return of the titles forthwith. This is the reason why that order should be set aside*. (emphasis added)

[61] Accordingly, from a careful perusal of the sealed order and the grounds of judgment of the Federal Court, it can be discerned that:

(i) the Federal Court affirmed the Court of Appeal's decision on the interpleader order but set aside the specific order for the return of the 18 titles because the titles had already been returned earlier; and

(ii) the Federal Court overturned the Court of Appeal's decision allowing the counterclaim and the award of damages together with interest.

[62] In the light of the foregoing, two conclusions can be inferred. Firstly, the respondent was not entitled to make the interpleader application. Secondly, the respondent was in breach of its undertaking when it refused to return the 18 titles to the appellant after being served with the Arbitral Award.

[63] In *Marzaini Zainuddin*, *supra* the advocate and solicitor appealed against the DB's decision to suspend him from practice pending a full inquiry into the complaint lodged by the complainant. In dismissing the appeal, Abdul Malik Ishak J (later JCA) had this to say:

> It goes without saying that the legal profession in this country must observe the highest possible standards of conduct. Nothing short of that would suffice. Disciplinary proceedings against recalcitrant advocates and solicitors are designed to enable members of the same profession to decide on the fate of their fellow practitioners. This is simply because members of the same profession should know and appreciate better than anyone else the standards of conduct expected of the legal profession. The DB, which consists of senior members of the Bar appointed under s. 93(3) of the Act, thought it fit to suspend the appellant based on the evidence presented to them. The DB should know better. In the words of Raja Azlan Shah CJ (Malaya) in *Au Kong Weng v. Bar Committee, Pahang* [1980] 2 MLJ 89 at p 91:
>
> > Statutes relating to the legal profession now entrust the supervision of advocates and solicitors' conduct to a committee of the profession, for it knows and appreciate better than anyone else the standards which responsible legal opinion demands of its own profession.

[64] In similar vein, in *Gana Muthusamy*, *supra* Gopal Sri Ram JCA (later FCJ) speaking for the Court of Appeal said at p. 881 (CLJ); p. 344 (MLJ):

> It is primarily for members of the Bar to decide what amounts to conduct unbecoming of an advocate and solicitor in particular circumstances, according to standards established by members of that honourable profession. Courts must necessarily exercise caution when entertaining an appeal in which the central question is whether particular conduct is unprofessional and cases meriting curial interference will be rare. Otherwise it will be the court and not the profession that will determine the yardstick of professional behaviour. We would, in this context, express our agreement with the following passage in the Guide to the Professional Conduct of Solicitors issued by the Council of the law Society in 1974, quoted by the learned judges of the High Court in their judgment:
>
> > One of the hallmarks of a developed profession is that it should lay down and maintain standards of professional conduct for its members based upon the best thinking of those members as to what constitutes proper conduct for a member of that profession.

[65] In *Loh Chow Tet*, *supra* the High Court affirmed the decision of the DB in ordering the appellant to pay a penalty of RM5,000. On appeal, the Court of Appeal citing *Gana Muthusamy*, *supra* dismissed the appeal by the advocate and solicitor and upheld the decision of High Court.

[66] In *Dr Siti Aishah Abdullah*, *supra* a case concerning an appeal against the decision of the Malaysian Medical Council which struck off the appellant from its register, the High Court applied the principles enunciated in *Gana Muthusamy*, *supra*.

[67] *Trikkon Sdn Bhd*, *supra* concerns a complainant's appeal against the decision of the DB dismissing their complaint against an advocate and solicitor. The High Court relying on *Gana Muthusamy*, *supra*, *Au Weng Kong*, *supra*, *Marzaini*, *supra* held that there were no grounds to interfere with the decision of the DB.

[68] *Mobikom Sdn Bhd*, *supra* which was relied on by learned counsel for the respondent relates to an application for an injunction to restrain the presentation of a winding-up petition which was premised on a s. 218 notice relying on an arbitration award. There is no issue relating to any breach of undertaking in that case. As such *Mobikum Sdn Bhd*, *supra* is distinguishable on the facts and is of no aid to the respondent.

Concluding Remarks

[69] In this instance, the circumstances are so exceptional and rare in that both the Court of Appeal and the Federal Court agree that the evidence showed collusion between the developer and the respondent (paras. [43] and [44] of the grounds of the judgment of the Federal Court).

[70] The court is therefore constrained to allow the appeal and set aside the decision of the DB. However, the court is mindful of the well settled principles on the legal profession being a self-regulating profession so that such matters should be decided upon by their peers. Accordingly, the court also ordered that the DB appoint a disciplinary committee to conduct a formal investigation into the appellant's complaint. Costs of the appeal in the sum of RM10,000 was awarded to the appellant.